

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
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6
7 August Term 2006
8

9 Argued: November 7, 2006 Decided: April 11, 2007

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11 Docket No. 05-5531-cr
12

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14
15 UNITED STATES OF AMERICA,

16
17 Appellee,

18 - against -

19
20 SOLOMON KAPLAN

21
22 Defendant-Appellant.
23

24 -----X

25
26 Before: FEINBERG, LEVAL, and CABRANES, Circuit Judges.
27

28 Appeal from a judgment of conviction, entered following a
29 jury trial in the United States District Court for the Southern
30 District of New York (Batts, J.), on all seven counts of an
31 indictment charging conspiracy, mail fraud, wire fraud, making
32 false statements in connection with health care matters, health
33 care fraud, witness tampering, and making false statements to the
34 FBI.
35

36 Affirmed in part, vacated in part, and remanded.
37

38 ZACHARY MARGULIS-OHNUMA, New York, New York, for
39 Defendant-Appellant

40
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42 Attorney, (Michael J. Garcia, United States
43 Attorney, Timothy Treanor and Jonathan S.
44 Kolodner, Assistant United States Attorneys,
45 on the brief), United States Attorney's
46 Office for the Southern District of New
47 York, for Appellee.

1 FEINBERG, Circuit Judge:

2 Solomon Kaplan appeals from a judgment of conviction,
3 entered following a jury trial in the United States District
4 Court for the Southern District of New York (Batts, J.), on all
5 seven counts of an indictment charging Kaplan's participation in
6 an insurance fraud scheme (Counts One through Five) and Kaplan's
7 interference with an investigation into that scheme (Counts Six
8 and Seven). Specifically, the indictment charged Kaplan with one
9 count of conspiracy¹ in violation of 18 U.S.C. § 371 (Count One);
10 two counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 2
11 (Counts Two and Three); one count of making false statements in
12 connection with health care matters in violation of 18 U.S.C. §§
13 1035 and 2 (Count Four); one count of health care fraud in
14 violation of 18 U.S.C. §§ 1347 and 2 (Count Five); one count of
15 witness tampering in violation of 18 U.S.C. §§ 1512(b) and 2
16 (Count Six); and one count of making false statements to an agent
17 of the Federal Bureau of Investigation ("FBI") in violation of 18
18 U.S.C. § 1001 (Count Seven).

19 On appeal, Kaplan's principal contentions are that (I) his
20 conviction on the insurance fraud counts (Counts One through
21 Five) must be vacated because the district court erred in

¹ The indictment alleged that the objects of the conspiracy were mail fraud, wire fraud, making false statements relating to health care matters, health care fraud, and witness tampering.

1 admitting (A) lay opinion testimony regarding his knowledge of
2 the fraud and (B) testimony concerning others' knowledge of the
3 fraud and (II) his conviction on the interference counts (Counts
4 Six and Seven) must be vacated because (A) the district court's
5 jury instruction on Count Six was erroneous in light of the
6 Supreme Court's supervening decision in *Arthur Andersen LLP v.*
7 *United States*, 544 U.S. 696 (2005); (B) the district court
8 improperly gave a conscious avoidance jury instruction on Count
9 Six; and (C) variance between a bill of particulars and proof at
10 trial concerning Count Seven constituted a constructive amendment
11 of the indictment or a prejudicial variance.

12 For the reasons set forth below, we agree that Kaplan's
13 conviction on Counts One through Five must be vacated because the
14 district court erred in admitting, without adequate foundation,
15 lay opinion testimony regarding Kaplan's knowledge of the fraud
16 and testimony regarding others' knowledge of the fraud, and that
17 at least the first of these errors was not harmless. However, we
18 affirm his conviction on Counts Six and Seven because these
19 evidentiary errors were harmless as to those counts, which relied
20 on strong independent evidence of the crimes charged in those
21 counts, and because we find no merit in Kaplan's other arguments
22 on appeal. The case is remanded for further proceedings
23 consistent with this opinion.

1 BACKGROUND

2 Viewed in the light most favorable to the Government, see
3 Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), the evidence
4 showed the following.

5 Josef Sherman, a medical doctor, and his brother, Yevgeny
6 Sherman, operated a medical clinic in Brooklyn, New York (the
7 "Clinic"). The Clinic hired "runners" to recruit patients by
8 staging automobile accidents and identifying individuals who had
9 been in legitimate accidents but were willing to exaggerate their
10 injuries. At the Clinic, these accident participants received
11 unnecessary treatment for their feigned injuries and were
12 compensated with a kickback. The Clinic then submitted
13 fraudulent insurance claims for medical expenses to collect money
14 under New York State's no-fault insurance law.

15 The accident participants were also referred to a
16 cooperating law office, which submitted on the participants'
17 behalf false or inflated insurance claims for bodily injury.
18 From January 2000 until July 30, 2001, most of the Clinic's cases
19 were referred to a law office (the "Law Office") operated in the
20 name of Alexander Galkovich, a lawyer hired by the Shermans and
21 their associate Gennady "Gene" Medvedovsky to serve as counsel of
22 record in the referred cases. The accident participants signed
23 a retainer agreement providing that the Law Office received one-
24 third of any insurance settlement as well as expenses.

1 Medvedovsky, although not an attorney, managed the Law Office on
2 behalf of the Shermans through a management company called
3 Starlin Executive Management. Galkovich paid almost all of the
4 proceeds he received from the insurance company settlements to
5 Starlin Management, and received \$1,000 per week as salary and
6 occasional bonuses. The Shermans and Medvedovsky extracted the
7 insurance proceeds from the law office principally by submitting
8 to Starlin Management fraudulent bills from fictitious entities
9 or by paying themselves salaries from Starlin Management.

10 By 2001, the Law Office had more than 3,000 active cases,
11 and was receiving approximately 80 to 200 new cases per month, a
12 significant portion of which came from the Sherman Clinic.
13 Approximately five to 10 percent of the cases at the Law Office
14 resulted from staged accidents, and 60 to 70 percent of the cases
15 involved clients who exaggerated or faked the injuries.

16 In July 2001, Galkovich was arrested by the FBI and charged
17 with filing false and fraudulent claims and coaching clients to
18 lie to the insurance companies. Because Galkovich thus stood to
19 lose his law license, the Shermans and Medvedovsky sought a
20 replacement to serve as attorney-of-record in the fraudulent
21 cases. They settled on Kaplan, with whom they were familiar
22 because a few of the Clinic's cases had previously been referred
23 to him. An employee of the Clinic, Alexander Burman, testified
24 that the cases referred to Kaplan were those that had been

1 rejected by other lawyers because they were considered too
2 obviously fraudulent.

3 In September 2001, Kaplan began representing 1,200 of
4 Galkovich's 3,000 clients. The Shermans and Medvedovsky, worried
5 that the transfer of all 3,000 cases from Galkovich to Kaplan
6 would look suspicious, arranged for Kaplan to formally purchase
7 the law firm from Galkovich. To make the deal appear legitimate,
8 they hired a lawyer to draft a contract and conduct a closing,
9 and Kaplan wrote several checks to Galkovich totaling \$50,000,
10 including a \$20,000 check at the closing. But at least some of
11 the money came from the Shermans and Medvedovsky and was later
12 returned to them by Galkovich. Thus, the Shermans and
13 Medvedovsky essentially bought the Law Office from themselves,
14 but structured the transaction to look as if Kaplan had bought it
15 from Galkovich.

16 Galkovich testified that on the way to the closing in
17 October 2001, Kaplan and Galkovich discussed the sale of the Law
18 Office, and Kaplan stated that "he had handled cases like this
19 before," which Galkovich understood to mean that Kaplan had
20 previously handled fake accident cases.

21 The Law Office continued to operate much as it had before,
22 with Kaplan now formally representing almost all of Galkovich's
23 3000 clients. Medvedovsky and others, including Emik Aguronov,
24 who was responsible for drafting false medical narratives to be

1 submitted to insurance companies on behalf of clients seeking
2 settlements, remained. Medvedovsky formed a new entity called
3 Prostaff Support Services, Inc., which performed the same
4 functions that Starlin Management had. From October 2001 through
5 March 2002, the Law Office had revenues of approximately
6 \$892,000. The proceeds of the fraud were transferred to
7 Medvedovsky and the Shermans through Prostaff, which was paid
8 over \$100,000 per month to "manage" the Law Office. Kaplan
9 received approximately \$74,000 in payments from the Law Office.

10 Kaplan, the Shermans, and Medvedovsky all agreed that Kaplan
11 would stay away from the Law Office and appear only to sign
12 checks and for essential meetings. A photograph of Kaplan's
13 office at the Law Office, Kaplan's appointment book, and the
14 testimony of FBI Special Agent Rothe revealed that Kaplan was
15 rarely present at the Law Office.

16 Following the sale of the Law Office to Kaplan, Galkovich
17 began cooperating with the FBI. Between approximately December
18 27, 2001 and February 22, 2002, Galkovich recorded his
19 conversations with the Shermans, Medvedovsky, and Kaplan on
20 approximately 10 separate occasions. In addition to general
21 discussions about the operations of the Law Office, the
22 conversations recorded by Galkovich detailed the efforts by the
23 Shermans, Medvedovsky, and Kaplan to prevent Galkovich from
24 cooperating with law enforcement authorities in its investigation

1 of the Sherman Clinic and the Law Office. Specifically, after
2 Galkovich informed his co-conspirators that he had been arrested
3 and that the FBI had inquired about the Shermans, a meeting was
4 arranged with Galkovich on January 8, 2002. Medvedvosky told
5 Galkovich that the purpose of the meeting was to "sit down and
6 decide everything" about Galkovich's case. Josef Sherman and
7 Gene Medvedovsky initially met with Galkovich alone and
8 questioned him about the statement he had given to the FBI at the
9 time of his arrest. Later, at Galkovich's request, Kaplan joined
10 the meeting, and Galkovich told Kaplan that they needed to
11 discuss the "transition of my practice to yours" and "this thing
12 that I'm going to need for . . . possibly for court or possibly
13 for the Disciplinary Committee." Medvedovsky, Sherman, and
14 Kaplan suggested a variety of false stories to explain the Law
15 Office transfer.

16 In March 2002, Kaplan, the Shermans, and Medvedovsky were
17 arrested by the FBI. Immediately following his arrest, Kaplan
18 agreed to be interviewed by the FBI. During that interview,
19 Kaplan made a number of statements that the Government contends
20 were false, including that in August 2001 he was introduced to
21 Galkovich and Medvedovsky by a Vladimir Scheckman; that, as part
22 of his purchase of the Law Office, he was to receive only 1,000
23 files; that he did not recall who gave him the \$20,000 check used
24 to purchase the Law Office; that the Law Office was sold to him

1 for \$120,000; that he was assured by Medvedovsky and Galkovich
2 that the charges against Galkovich "meant nothing because
3 Galkovich had done nothing wrong"; that he "just stopped by" the
4 January 8 meeting between Galkovich, Medvedovsky, and Sherman
5 without planning in advance to participate; and that he did not
6 take the conversation on January 8 "seriously" and they were just
7 "joking around."

8 In August 2002, Josef Sherman, Eugene Sherman, and
9 Medvedovsky pled guilty to a three-count information charging
10 them with conspiracy, mail fraud, and witness tampering. Kaplan
11 was tried on the seven-count indictment against him described
12 above. After an approximately two-week trial, the jury found
13 Kaplan guilty on all counts. In August 2005, the district court
14 sentenced Kaplan principally to 27 months of imprisonment, three
15 years of supervised release, and \$200,000 in restitution, but
16 granted bail pending appeal pursuant to 18 U.S.C. § 3143(b).

17 This appeal followed.

18 DISCUSSION

20 **I. Counts One through Five: The Insurance Fraud Scheme**

21 Turning first to the insurance fraud counts (Counts One
22 through Five), Kaplan argues on appeal, among other things, that
23 his conviction must be vacated because the district court erred
24 in admitting (A) lay opinion testimony regarding his knowledge of

1 the fraud and (B) testimony concerning others' knowledge of the
2 fraud. We consider each of his arguments in turn.

3 **A. Admission of Galkovich's lay opinion testimony**

4 The first issue before us concerns the district court's
5 admission of lay opinion testimony regarding Kaplan's knowledge
6 of the fraud. Kaplan principally objects to two colloquies in
7 which Galkovich recounted a conversation he and Kaplan had as
8 they drove together to the meeting in October 2001 to finalize
9 the sale of the Law Office to Kaplan. After describing the
10 conversation, Galkovich was allowed to offer his lay opinion
11 testimony regarding Kaplan's knowledge of the fraud. First, on
12 direct examination, Galkovich testified as follows:

13 [Prosecutor]: Did you have any discussions in the car
14 ride on the way to Davis' office?
15

16 [Galkovich]: Yes. It was actually the first time we
17 really talked, me and Solomon Kaplan. And I asked him,
18 What do you do? What kind of work do you do? Are you
19 familiar with car accident cases, with the process of
20 settlement and what it takes to settle? And he
21 explained, yes he has handled cases like this before.
22 Yes, he has settled cases before.
23

24

25
26 He explained that he has experience with these kinds of
27 cases.
28

29 [Prosecutor]: What did you understand him to mean when
30 he said "these kinds of cases"?

31 [Defense Counsel]: Objection.
32

33
34 The Court: I will allow it.
35

1 [Galkovich]: That he understood that these were car
2 accident cases where people exaggerated their injuries,
3 where it was crucial to have a narrative report that
4 exaggerated the injuries, that these reports were bought
5 for the best of prices to get the best of reports and
6 that you could settle these cases for very good money in
7 a short period of time.

8
9 Joint Appendix ("JA") 104-05. Then, on redirect, Galkovich
10 elaborated:

11 [Prosecutor]: What happened in this conversation?

12
13 [Galkovich]: I asked him what experience he had with the
14 car accident cases and generally what kind of experience
15 he had, and he told me that he knew about these car
16 accidents, he knew how to handle these cases, he knew
17 how to maximize potential recoveries, and what is
18 supposed to be in the files, how they are supposed to be
19 worked up.

20
21 [Prosecutor]: What was your purpose in asking Kaplan
22 this question?

23
24 [Galkovich]: I wanted to know how much he knew about the
25 fraudulent office that he is participating in.

26
27 [Prosecutor]: And after you got this answer from Mr.
28 Kaplan, what did you think?

29
30 [Galkovich]: I think he knew exactly what he was getting
31 into.

32
33 JA 138-39.¹

34 We review a district court's decision to admit evidence,
35 including lay opinion testimony, for abuse of discretion. See
36 United States v. Yuri Garcia, 413 F.3d 201, 210 (2d Cir. 2005)
37 (citing Old Chief v. United States, 519 U.S. 172, 174 n.1

¹ The two colloquies quoted above are hereafter frequently referred to as "Galkovich's lay opinion testimony."

1 (1997)). "A district court 'abuses' or 'exceeds' the discretion
2 accorded to it when (1) its decision rests on an error of law
3 (such as application of the wrong legal principle) or a clearly
4 erroneous factual finding, or (2) its decision -- though not
5 necessarily the product of a legal error or a clearly erroneous
6 factual finding -- cannot be located within the range of
7 permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d
8 163, 169 (2d Cir. 2001) (footnotes omitted).

9 The Federal Rules of Evidence, in a sharp departure from the
10 common law, see *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57
11 F.3d 1190, 1195 (3d Cir. 1995) (Becker, J.), permit lay witnesses
12 to testify in the form of opinions to address a problem
13 identified by Judge Learned Hand many years ago:

14 Every judge of experience in the trial of causes has
15 again and again seen the whole story garbled, because of
16 insistence upon a form with which the witness cannot
17 comply, since, like most men, he is unaware of the
18 extent to which inference enters into his perceptions.
19 He is telling the 'facts' in the only way that he knows
20 how, and the result of nagging and checking him is often
21 to choke him altogether, which is, indeed, usually its
22 purpose.

23
24 *Central R.R. Co. of N.J. v. Monahan*, 11 F.2d 212, 214 (2d Cir.
25 1926); see also *Yuri Garcia*, 413 F.3d at 211 ("eyewitnesses
26 sometimes find it difficult to describe the appearance or
27 relationship of persons, the atmosphere of a place, or the value
28 of an object by reference only to objective facts").
29 Accordingly, Rule 701 of the Federal Rules of Evidence was

1 adopted "to accommodate and ameliorate these difficulties by
2 permitting lay witnesses, in appropriate circumstances, to
3 testify in language with which they are comfortable." 4 Jack B.
4 Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §
5 701.02 (Joseph M. McLaughlin ed., 2d ed. 2004).

6 But to ensure that lay opinion testimony is reliable and
7 does not usurp the jury's role as fact-finder, Rule 701 imposes
8 certain foundation requirements that must be satisfied if such
9 testimony is to be admitted:

10 If the witness is not testifying as an expert, the
11 witness' testimony in the form of opinions or inferences
12 is limited to those opinions or inferences which are (a)
13 rationally based on the perception of the witness, (b)
14 helpful to a clear understanding of the witness'
15 testimony or the determination of a fact in issue, and
16 (c) not based on scientific, technical, or other
17 specialized knowledge within the scope of Rule 702.

18 Fed. R. Evid. 701 (2001). In interpreting these requirements, we
19 have observed that (a) the rational-basis requirement "is the
20 familiar requirement of first-hand knowledge or observation,"
21 United States v. Rea, 958 F.2d 1206, 1215 (2d Cir. 1992) (quoting
22 Fed. R. Evid. 701 advisory committee's note on 1972 Proposed
23 Rules); (b) the helpfulness requirement is principally "designed
24 to provide assurance[] against the admission of opinions which
25 would merely tell the jury what result to reach," id. (quoting
26 Fed. R. Evid. 704 advisory committee's note on 1972 Proposed
27 Rules); and (c) the "not based on specialized knowledge"
28 requirement requires that "a lay opinion must be the product of

1 reasoning processes familiar to the average person in everyday
2 life," Yuri Garcia, 413 F.3d at 215.² See also Fed. R. Evid. 701
3 advisory committee's note on 2000 amendments.

4 The government's evidence failed to demonstrate that
5 Galkovich's lay opinion testimony was "rationally based on the
6 perception of the witness." Fed R. Evid. 701(a). We note that
7 Rule 701(a) requires that lay opinion testimony be both (a) based
8 on the witness's first-hand perceptions and (b) rationally
9 derived from those first-hand perceptions.

10 As to the first of these requirements, Rule 701(a) reflects,
11 in part, the Rules' more general requirement that "[a] witness
12 may not testify to a matter unless evidence is introduced
13 sufficient to support a finding that the witness has personal
14 knowledge of the matter." Fed. R. Evid. 602; see also United
15 States v. Durham, 464 F.3d 976, 982 (9th Cir. 2006) ("opinion
16 testimony of lay witnesses must be predicated upon concrete facts
17 within their own observation and recollection -- that is facts
18 perceived from their own senses, as distinguished from their
19 opinions or conclusions drawn from such facts" (internal
20 quotation marks omitted)). When Galkovich was asked to
21 articulate the basis for his opinion, he answered, "I based it on
22 the only thing I could base it on, which is my experience there,

² In 2000, after Rea was decided, Rule 701 was amended to include 701(c).

1 what people said about [Kaplan], my conversation with [Kaplan],
2 everything that I [had] been involved in. That's what my opinion
3 could be based on." JA 140. Although Galkovich asserts that his
4 testimony was based in part on first-hand experience --
5 principally his prior experiences at the Law Office and his
6 conversation with Kaplan -- his response was extremely vague.
7 Thus, Galkovich's testimony failed to show that his opinion as to
8 Kaplan's knowledge was rationally based on facts he had observed.

9 We are therefore unable to conclude, as we must under Rule
10 701, that the opinion he offered was rationally based on his own
11 perceptions. See *Rea*, 958 F.2d at 1216 ("When a witness has not
12 identified the objective bases for his opinion, the proffered
13 opinion obviously fails completely to meet the requirements of
14 Rule 701 . . . because there is no way for the court to assess
15 whether it is rationally based on the witness's perceptions . .
16 . ."). We applied this requirement to similar facts in *Rea*, and
17 observed that lay opinion testimony regarding a defendant's
18 knowledge will, in most cases, only satisfy the rationally-based
19 requirement if the witness has personal knowledge of one or more
20 "objective factual bases from which it is possible to infer with
21 some confidence that a person knows a given fact . . .
22 includ[ing] what the person was told directly, what he was in a
23 position to see or hear, what statements he himself made to
24 others, conduct in which he engaged, and what his background and

1 experience were." 958 F.2d at 1216. Because the Government did
2 not lay an adequate foundation, Galkovich's testimony expressing
3 his opinion as to Kaplan's knowledge was not admissible.

4 Accordingly, having found that Galkovich's lay opinion
5 testimony does not satisfy Rule 701, we conclude that the
6 district court erred in admitting it.

7 **B. Admission of Galkovich's additional testimony regarding**
8 **his and others' knowledge**
9

10 Kaplan asserts that it was error for the district court to
11 admit Galkovich's additional testimony regarding Galkovich and
12 others' knowledge of the fraud as circumstantial evidence of
13 Kaplan's knowledge. Specifically, Galkovich was permitted to
14 testify that (1) when he first saw the building in which the Law
15 Office was located, he thought, "[t]his is where I am going to
16 get arrested," JA 84; (2) everyone he spoke with told him not to
17 buy the Law Office, JA 87; (3) the fraud was "done very subtly"
18 because "this whole industry was a very big sham and it was big
19 lies," JA 90; (4) the fraud was not discussed explicitly because
20 it was "kind of like . . . hear no evil, see no evil," and he was
21 warned to "be very careful in what you say," JA 94; (5)
22 "[e]veryone knew what was going on, but you don't say it," JA 94;
23 (6) at a Christmas party at the Law Office, Eugene Sherman read
24 a poem about clients getting paid for sham injuries, JA 97; and
25 (7) Steven Rosenberg, a lawyer at the Law Office, quit because he

1 saw a file with "blatant" fraud, JA 116-19, and Michael Brummer,
2 another lawyer at the Law Office, was "very sensitive and nervous
3 about what was going on in the office" and was "always very
4 nervous when we were skirting the issue of fraud," JA 119-21.

5 As previously noted, we review a district court's
6 evidentiary rulings for abuse of discretion. See Yuri Garcia,
7 413 F.3d at 210 (citing *Old Chief*, 519 U.S. at 174 n.1). Kaplan
8 argues that the district court abused its discretion because the
9 evidence was irrelevant and should have been excluded under Fed.
10 R. Evid. 402 or, in the alternative, that its probative value was
11 substantially outweighed by the danger of unfair prejudice and
12 should have been excluded under Fed. R. Evid. 403. The
13 Government argues that the testimony was relevant to the question
14 of whether Kaplan was aware of the fraud because evidence that
15 the fraud was obvious and widely-known tended to make it more
16 probable that Kaplan also knew about it. As the prosecutor
17 argued to the jury, "[Kaplan] had to know. Everybody else did."

18 The parties vigorously dispute which of two precedents --
19 *United States v. Patrisso*, 262 F.2d 194 (2d Cir. 1958), and
20 *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) -- controls
21 this case. In *Patrisso*, a truck load of television tubes was
22 hijacked; Patrisso, who knew they were stolen, sold them to
23 Ellis, who also knew; Ellis, in turn, sold them to Postrel;
24 finally, Postrel sold 1,000 of them to defendant Mankes. 262

1 F.2d at 196. We reversed Manke's conviction, finding that the
2 district court had erred by, inter alia, allowing the Government
3 to introduce Postrel's knowledge of the theft without evidence
4 that Postrel, or anyone else, had communicated that fact to
5 Manke. Id. at 197. Over four decades later, in Schultz, we
6 distinguished Patrisso in upholding the admission of testimony
7 regarding other individuals' knowledge of a particular Egyptian
8 law to prove the defendant's knowledge of the law, finding that
9 it was "relevant both to explain the practice of the industry in
10 which this prosecution arose and to establish what someone with
11 [defendant's] extended background in the industry probably would
12 know." 333 F.3d at 416 (quoting United States v. Leo, 941 F.2d
13 181, 197 (3d Cir. 1991)).

14 We believe that Patrisso and Schultz, though they reach
15 different outcomes, stand for the same principle: evidence
16 regarding the knowledge of individuals other than the defendant
17 should be admitted only if there is some other evidence in the
18 record -- concerning, for example, the nature of the fraud or the
19 relationship of the parties -- from which to conclude that the
20 defendant would have the same knowledge. Indeed, the Schultz
21 court noted that the principal difference between the two cases
22 was the nature of the knowledge involved: Schultz was likely to
23 have the same knowledge, the defendant in Patrisso wasn't. 333
24 F.3d at 416. What of Kaplan?

1 We turn first to relevance. Relevant evidence includes any
2 "evidence having any tendency to make the existence of any fact
3 that is of consequence to the determination of the action more
4 probable or less probable than it would be without the evidence."
5 Fed. R. Evid. 401; see also Fed. R. Evid. 402. "Implicit in that
6 definition are two distinct requirements: (1) [t]he evidence must
7 be probative of the proposition it is offered to prove, and (2)
8 the proposition to be proved must be one that is of consequence
9 to the determination of the action." *United States v. Diaz*, 878
10 F.2d 608, 614 (2d Cir. 1989). As the Supreme Court has observed,
11 "[t]he Rules' basic standard of relevance . . . is a liberal
12 one." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 587 (1993).
13 Despite this liberal standard, we think this evidence had little
14 relevance in the circumstances of Kaplan's case. Evidence of
15 others' knowledge would have been highly relevant had it been
16 supplemented by evidence supporting the conclusion that such
17 knowledge was communicated to Kaplan, or that Kaplan had been
18 exposed to the same sources from which these others derived their
19 knowledge of the fraud. In the absence of such evidence, the
20 relevance of others' knowledge was at best minimal in proving
21 Kaplan's knowledge.

22 Nor does our inquiry end there -- even as to evidence that
23 is plainly relevant, the trial judge retains discretion to
24 exclude the evidence "if its probative value is substantially

1 outweighed by the danger of unfair prejudice." Fed. R. Evid.
2 403. This evidence was of minimal probative value for two
3 reasons. First, as noted, the Government failed to offer
4 evidence that would connect the third parties' knowledge of the
5 fraud to Kaplan. Under the Government's own theory of the case,
6 Kaplan spent very little time at the law office and reviewed very
7 few claims directly. Moreover, the Government proffered no
8 evidence that anyone who allegedly was aware of the fraudulent
9 scheme actually had communicated his knowledge to Kaplan. In
10 fact, Galkovich testified that the participants in the fraud were
11 careful not to speak openly about the fraudulent nature of the
12 injury claims: he testified that clients did not directly admit
13 to the firm that their accidents were staged, but rather that
14 "generally it was done very subtly," and that he did not have
15 explicit conversations about the fraud with clients or other
16 people in the office "because you don't want to get in trouble .
17 . . It is kind of like, you know, hear no evil, see no evil. . .
18 . Everyone knew what was going on, but you don't say it." This
19 was not an office where the illegal nature of the business was
20 necessarily visible and audible to everyone who worked there. In
21 that sense, we think this case is more analogous to Patrisso than
22 to Schultz: as in Patrisso, the Government failed to offer
23 evidence that would explain how defendant Kaplan would have
24 obtained the third parties' knowledge of the criminal scheme.

1 Second, much of the testimony concerning knowledge of the
2 fraud was so speculative or flawed in other respects that it had
3 little or no probative value. For example, the Government did
4 not lay a proper foundation for Galkovich's statement that it was
5 "[his] understanding that this whole business was very very --
6 this whole industry was a very big sham and it was big lies";
7 Galkovich was not qualified as one having special knowledge of
8 the personal injury "industry," so it is difficult to see how
9 Galkovich had sufficient knowledge of the industry to testify
10 competently on its criminal nature. See Fed. R. Evid. 602 ("A
11 witness may not testify to a matter unless evidence is introduced
12 sufficient to support a finding that the witness has personal
13 knowledge of the matter."); *Woodman v. WWOR-TV, Inc.*, 411 F.3d
14 69, 86-87 (2d Cir. 2005) (affirming district court's decision to
15 exclude plaintiff's testimony that her age was "well known
16 throughout the industry" on ground that plaintiff was "hardly
17 competent to testify to how others in the broadcast community
18 perceived her age" (citing Fed. R. Evid. 602)). Galkovich's
19 testimony concerning the alleged knowledge of Rosenberg, another
20 lawyer in the office, was hearsay upon hearsay; Rosenberg
21 allegedly made statements to a secretary in the office, who
22 allegedly told Galkovich, who offered the jury the conclusion
23 that Rosenberg had quit his job because of fraud. Cf. *Brown v.*
24 *Keane*, 355 F.3d 82, 90 (2d Cir. 2004) ("An assertion of fact

1 based on conjecture and surmise, to which the declarant would not
2 be allowed to testify if called to the witness box, does not
3 become admissible under an exception to the hearsay rule . . .
4 .”).

5 We conclude, furthermore, that this limited probative value
6 is substantially outweighed by the risk of unfair prejudice.
7 Although relevant evidence is always prejudicial to one side, we
8 conclude that the risk of unfair prejudice here -- in particular,
9 the likelihood that jurors would render a decision on an improper
10 basis by giving this testimony undue weight or improperly holding
11 Kaplan liable because they believed he should have known of the
12 fraud -- was great. The jury was required to draw a series of
13 inferences, unsupported by other evidence, to connect Galkovich's
14 testimony about his guilty knowledge (and that of others) to
15 Kaplan's own knowledge, the ultimate issue in the case. Under
16 the circumstances, the District Court should have concluded that
17 whatever slight probative value the testimony might have had was
18 outweighed by the risk that the jury would draw improper
19 inferences from the testimony. Cf. *United States v. Ravich*, 421
20 F.2d 1196, 1204 n.10 (2d Cir. 1970) (Friendly, J.) ("The length
21 of the chain of inferences necessary to connect the evidence with
22 the ultimate fact to be proved necessarily lessens the probative
23 value of the evidence, and may therefore render it more
24 susceptible to exclusion as unduly confusing, prejudicial, or

1 time-consuming"). Moreover, Galkovich's testimony that
2 the entire industry in which Kaplan operated was "a very big sham
3 and it was big lies" was so inflammatory that it should have been
4 excluded as prejudicial under the circumstances. Furthermore,
5 the likelihood of prejudice was increased by the government's
6 improper use of the evidence of others' knowledge. In summation,
7 the prosecutor argued, "[Kaplan] had to know. Everybody else
8 did." As noted, the evidence did not support any such inference.

9 Accordingly, with respect to Galkovich's testimony regarding
10 his and others' knowledge of the fraud, we conclude that the risk
11 of unfair prejudice substantially outweighed the limited
12 probative value, and hold that the district court erred in
13 receiving this evidence.

14 **C. Harmless error analysis**

15 We will reverse on account of these evidentiary errors only
16 if they affect "substantial rights." See Fed. R. Crim. P. 52(a);
17 Fed. R. Evid. 103(a); Yuri Garcia, 413 F.3d at 210. In *Kotteakos*
18 *v. United States*, the Supreme Court set forth the analysis for
19 determining whether a non-constitutional error is harmless:

20 If, when all is said and done, the conviction is sure
21 that the error did not influence the jury, or had but
22 very slight effect, the verdict and the judgment should
23 stand, except perhaps where the departure is from a
24 constitutional norm or a specific command of Congress .
25 . . . But if one cannot say, with fair assurance, after
26 pondering all that happened without stripping the
27 erroneous action from the whole, that the judgment was
28 not substantially swayed by the error, it is impossible
29 to conclude that substantial rights were not affected.

1 The inquiry cannot be merely whether there was enough to
2 support the result, apart from the phase affected by the
3 error. It is rather, even so, whether the error itself
4 had substantial influence. If so, or if one is left in
5 grave doubt, the conviction cannot stand.

6 328 U.S. 750, 764-65 (1946) (footnote omitted); see also United
7 States v. Dukagjini, 326 F.3d 45, 62 (2d Cir. 2003) (holding that
8 non-constitutional error affects substantial rights if it had a
9 "substantial and injurious effect or influence" on the jury's
10 verdict). But "we are not required to conclude that it could not
11 have had any effect whatever; the error is harmless if we can
12 conclude that that testimony was 'unimportant in relation to
13 everything else the jury considered on the issue in question, as
14 revealed in the record.'" Rea, 958 F.2d at 1220 (quoting Yates
15 v. Evatt, 500 U.S. 391, 403 (1991)). In conducting this inquiry,
16 we principally consider "(1) the overall strength of the
17 prosecution's case; (2) the prosecutor's conduct with respect to
18 the improperly admitted evidence; (3) the importance of the
19 wrongly admitted testimony; and (4) whether such evidence was
20 cumulative of other properly admitted evidence." Zappulla v. New
21 York, 391 F.3d 462, 468 (2d Cir. 2004).

22 Applying these factors, it is clear that Galkovich's lay
23 opinion testimony may have "substantially swayed," Kotteakos, 328
24 U.S. at 765, the jury's verdict on Counts One through Five
25 because it was not "unimportant in relation to everything else

1 the jury considered on the issue in question."³ The Government's
2 case on those five counts rested principally on the following
3 evidence: the recorded conversations during which Kaplan,
4 Sherman, and Medvedovsky told Galkovich to lie, Kaplan's sham
5 purchase of the Law Office, Kaplan's disinterest in cases filed
6 by the Law Office in his name, Kaplan's absence from the Law
7 Office, the arrangement between the Law Office and Prostaff and
8 Medvedovsky, Kaplan's receipt of over \$70,000 for his limited
9 services at the Law Office, and his false statements upon his
10 arrest. Although the Government may, of course, prove its case
11 exclusively with such circumstantial evidence, their case with
12 respect to those counts was not strong.

13 As a result, and because Kaplan's knowledge of the fraud was
14 the central disputed issue in the case, Galkovich's lay opinion
15 testimony was vitally important -- just the sort of evidence that
16 might well sway a jury confronted with a marginal circumstantial
17 case. Our concern is heightened by the Government's trial
18 strategy with respect to the evidence; the Government repeatedly
19 called the jury's attention to Galkovich's lay opinion testimony.
20 In its opening statement, the Government told the jury that
21 "Galkovich will recount for you conversations he had with Kaplan
22 during the sale in which they discussed the fraudulent nature of

³ As a result of this conclusion, we need not evaluate whether the error in admitting Galkovich's testimony regarding others' knowledge was harmless.

1 the law practice." In its closing, the Government reminded the
2 jury that "Galkovich explained to you that that conversation, and
3 Kaplan's comments, satisfied Galkovich that Kaplan understood all
4 about the fraud," and that "[w]e know . . . from the testimony of
5 the witnesses, that Solomon Kaplan knew, undeniably knew, about
6 the fraud at the law firm." In rebuttal, the Government stated
7 that "[Kaplan] essentially admitted to Galkovich that he knew
8 what was going on at this law office. That was how Galkovich
9 understood what he said. It is not his opinion. He was there.
10 He had the conversation." And, finally, we observe that this
11 evidence was unique and thus was not cumulative of properly
12 admitted evidence.

13 Because we cannot, in light of the foregoing, say with fair
14 assurance that Galkovich's lay opinion testimony did not
15 "substantially sway[]" the jury's verdict as to Counts One, Two,
16 Three, Four, and Five, we conclude that this error was not
17 harmless and therefore vacate Kaplan's conviction on those
18 counts.

19
20 **II. Counts Six and Seven: Interfering with the Investigation**

21 We turn next to Kaplan's arguments challenging his
22 conviction for interfering with the investigation by tampering
23 with a witness (Count Six) and giving false statements to the FBI
24 (Count Seven). He argues on appeal, among other things, that his

1 conviction on those two counts must be vacated due to the
2 district court's witness tampering and conscious avoidance jury
3 instructions and a constructive amendment of, or prejudicial
4 variance from, the indictment, as clarified by a bill of
5 particulars.⁴ We address his arguments in turn.

6 **A. Witness tampering jury instruction**

7 Kaplan contends that the district court's jury instruction
8 on Count Six, alleging witness tampering, is deficient in light
9 of the Supreme Court's decision in *Arthur Andersen LLP v. United*
10 *States*, 544 U.S. 696 (2005), decided after his conviction.

11 Kaplan made no objection to this aspect of the jury
12 instruction. Therefore, we review his argument under the plain
13 error standard of Fed. R. Crim. P. 52(b). We have ruled that
14 when the claim of error derives from a supervening decision
15 altering a settled rule of law in the Circuit, as it does here,
16 the claimed error should be assessed under a standard of
17 "modified plain-error." See *United States v. Viola*, 35 F.3d 37,

⁴ We note briefly that to the extent Kaplan argues that the evidentiary errors discussed in Section I compel us to vacate his conviction on Counts Six and Seven as well, we reject his argument. As to Counts Six and Seven, the evidentiary errors were harmless because the improper evidence was at most tangential to the theory of Counts Six and Seven. The Government's case rested on substantial independent evidence, including tape recordings of Kaplan's participation in witness tampering, Kaplan's post-arrest statement, and testimony by the FBI agent who took Kaplan's post-arrest statement, to support his conviction. Moreover, the Government did not emphasize the testimony in issue in urging the jury to convict Kaplan of these two counts.

1 41-44 (2d Cir. 1994). Ordinarily, the defendant asserting plain
2 error bears the burden of persuasion as to prejudice, but under
3 our "modified plain-error" review, the Government bears that
4 burden. See *id.* at 41-42. In this case it makes no difference
5 whether the standard applied is the conventional or the modified
6 "plain error" standard because any error in the charge was
7 inconsequential and did not rise to the level of either
8 standard.⁵

9 Count Six alleges violations of 18 U.S.C. §§ 1512(b)(1) and
10 (b)(3), which provide that:

11 (b) Whoever knowingly uses intimidation, threatens or
12 corruptly persuades another person, or attempts to do
13 so, or engages in misleading conduct toward another
14 person, with intent to--

15 (1) influence, delay or prevent the testimony of
16 any person in an official proceeding;

17 . . .

18 (3) hinder, delay, or prevent the communication to
19 a law enforcement officer or judge of the United
20 States of information relating to the commission or
21 possible commission of a Federal offense or a
22 violation of conditions of probation, supervised
23 release, parole, or release pending judicial
24 proceedings;

25 shall be fined under this title or imprisoned not more
26 than ten years, or both.

27
28 In Arthur Andersen, the Supreme Court found the district
29 court's instructions were deficient in two respects -- they

⁵ The Government argues that the Supreme Court's decision in *Johnson v. United States*, 520 U.S. 461 (1997), requires that this Court abandon its "modified plain-error" test. We need not address the merits of this argument because we find that, even under the modified plain error test, Kaplan is not entitled to have his witness tampering conviction overturned.

1 failed to convey the requirements of 18 U.S.C. § 1512(b)(2) of
2 mens rea and nexus to an official proceeding. As to the first of
3 these deficiencies, the district court in Arthur Andersen
4 instructed the jury that it could convict Arthur Andersen of
5 witness tampering in relation to an official proceeding if it
6 found that Arthur Andersen intended to "subvert, undermine, or
7 impede" governmental factfinding by suggesting to its employees
8 that they enforce the document retention policy, and that "even
9 if [Arthur Andersen] honestly and sincerely believed that its
10 conduct was lawful, you may find [Arthur Andersen] guilty." 544
11 U.S. at 706. These instructions, the Supreme Court held, did not
12 properly convey the mens rea required for a violation of 18
13 U.S.C. § 1512(b) -- they "diluted the meaning of 'corruptly' so
14 that it covered innocent conduct," id. -- because "[o]nly persons
15 conscious of wrongdoing can be said to 'knowingly . . . corruptly
16 persuad[e],' " id. (emphasis supplied).

17 As to the second deficiency -- regarding the so-called
18 "nexus requirement" -- the Supreme Court in Arthur Andersen found
19 the instructions deficient because "[a] 'knowingly . . .
20 corrup[t] persuade[r]' cannot be someone who persuades others to
21 shred documents under a document retention policy when he does
22 not have in contemplation any particular official proceeding in
23 which those documents might be material," id. at 708, and the
24 district court's instructions "led the jury to believe that it

1 did not have to find any nexus between the 'persua[sion]' to
2 destroy documents and any particular proceeding," id. at 707.
3 Cf. United States v. Arthur Andersen, 374 F.3d 281, 298 n.32 (5th
4 Cir. 2004) (reciting district court's charge in Arthur Andersen
5 defining "official proceeding"). Instead, a "knowingly . . .
6 corrupt persuader" must believe that his actions are likely to
7 affect a particular, existing or foreseeable official proceeding.
8 See Arthur Andersen, 544 U.S. at 708; see also United States v.
9 Quattrone, 441 F.3d 153, 181 (2d Cir. 2006) (holding that Arthur
10 Andersen requires that there be "some nexus between the effort to
11 tamper . . . pertaining to the relevant proceeding and awareness
12 that such conduct was likely to affect the proceeding").

13 Kaplan contends that the district court's instructions in
14 this case are similarly deficient. The district court instructed
15 the jury on Count Six as follows:

16 The first element the government must prove is that
17 the defendant corruptly persuaded a person, or attempted
18 to do so.

19

20 The word "corruptly" simply means having an
21 improper purpose. An intent to subvert or undermine the
22 factfinding ability of an official proceeding is an
23 improper purpose . . ."

24 The second element that the government must prove
25 is that the defendant acted knowingly and with the
26 specific intent to influence the testimony of another
27 person in an official federal proceeding.

28 An act is done "knowingly" if it is done
29 voluntarily and intentionally and not because of mistake
30 or accident.

31 By specific intent, I meant that the defendant must
32 have acted knowingly and with the unlawful intent to
33 influence the testimony of another person in an official

1 federal proceeding; or to hinder, delay or prevent the
2 communication to a federal law enforcement officer or
3 judge information relating to the commission or possible
4 commission of a federal offense.

5
6 JA 287-88.

7 Applying the lessons of Arthur Andersen, we find that the
8 charge adequately conveyed the statute's mens rea requirement.
9 Viewing the charge as whole, the district court conveyed the
10 substantial equivalent of Arthur Andersen's holding that the
11 defendant must be "conscious of wrongdoing" by instructing the
12 jury to convict only if it found that the defendant acted with an
13 "improper purpose" and "acted knowingly and with the unlawful
14 intent to influence the testimony." We note that the Supreme
15 Court in Arthur Andersen expressly faulted the jury instructions
16 in that case for (1) specifying that the jury could convict if it
17 found that Arthur Andersen intended to "subvert, undermine, or
18 impede" (emphasis added) because "'impede' has broader
19 connotations than 'subvert' or even 'undermine,' and many of
20 these connotations do not incorporate any 'corruptness' at all,"
21 544 U.S. at 706-07 (brackets omitted), and (2) instructing the
22 jury that "even if [Arthur Andersen] honestly and sincerely
23 believed that its conduct was lawful, you may find [Arthur
24 Andersen] guilty," id. at 706. The district court here charged
25 nothing of the sort. To convict, the jury had to find that
26 Kaplan acted with an "improper purpose" and with "unlawful
27 intent."

1 Second, with regard to Kaplan's argument that the district
2 court's instructions were erroneous in light of Arthur Andersen's
3 discussion of the statute's nexus requirement, we note first that
4 the charges in Arthur Andersen were brought under two clauses of
5 § 1512(b) (2), both of which explicitly include as an element that
6 the obstruction or tampering relate to an "official proceeding,"
7 see *id.* at 702. Kaplan, however, was charged under §§ 1512(b) (1)
8 and (3). With respect to § 1512(b) (3), it is unclear whether
9 Arthur Andersen's nexus requirement is applicable because §
10 1512(b) (3) does not explicitly refer to an "official proceeding."
11 See *United States v. Byrne*, 435 F.3d 16, 23-25 (1st Cir. 2006).
12 We need not decide this issue, because even if the nexus
13 requirement is applicable to prosecutions under § 1512(b) (3), and
14 the district court's instructions under § 1512(b) (3) were
15 erroneous for failure to discuss nexus, any such error was
16 harmless in the circumstances of this case for the reasons
17 discussed below.

18 Kaplan was, as noted, also charged under § 1512(b) (1), which
19 does contain an explicitly stated element of an "official
20 proceeding." The jury instructions on this charge undoubtedly
21 needed to comply with the nexus requirement discussed in Arthur
22 Andersen. The district court instructed the jury that the
23 government "must prove" that the defendant acted "with the
24 specific intent to influence the testimony of another person in

1 an official federal proceeding." The instructions did not
2 identify the official proceeding. In view of the Supreme Court's
3 discussion in *Arthur Andersen*, 544 U.S. at 707 (finding the
4 instructions infirm because they led the jury to believe that it
5 did not have to find any nexus between the "persuasion" to
6 destroy documents and any "particular proceeding"), it would
7 surely have been more prudent, even where the evidence only
8 points to one federal proceeding, for the district judge to
9 identify the "particular" federal proceeding that the defendant
10 intended to obstruct. We need not decide whether the failure to
11 do so in this case was error, because as we note below, it was
12 harmless in any event.

13 Furthermore, in *Quattrone*, 441 F.3d at 153, the district
14 court, following the Supreme Court's formulation of the nexus
15 requirement in *United States v. Aguilar*, 515 U.S. 593, 599
16 (1995), described nexus to the jury as "some relationship in
17 time, causation or logic, between the defendant's actions and the
18 grand jury proceeding so that his action or actions may be said
19 to have the natural and probable effect of interfering with that
20 proceeding." *Quattrone*, 441 F.3d at 177 n.24. We ruled that this
21 instruction accurately described the nexus requirement. *Id.* at
22 178. The instructions given below did not contain this language,
23 or its reasonable equivalent. In that regard, they were
24 deficient.

1 Nevertheless, Kaplan is not entitled to reversal of his
2 conviction on Count Six. Despite this error and other arguable
3 deficiencies in the charge on nexus, any deficiencies were
4 harmless in the particular circumstances of the case and did not
5 amount to plain error. Unlike the defendants in Arthur Andersen
6 and Quattrone, who, in accordance with a routine file purging
7 policy, had urged destruction of documents that they may not have
8 known were relevant to any "particular proceeding," Arthur
9 Andersen, 544 U.S. at 707, Kaplan, according to the government's
10 evidence, directly participated in an effort to influence
11 Galkovich's testimony. In his summation, Kaplan implicitly
12 conceded that, if the jury found that he urged Galkovich to
13 testify falsely, it was with respect to either the state
14 disciplinary proceeding or the federal criminal proceeding.
15 Kaplan argued that the jury should find that any such effort
16 related to the state disciplinary proceeding, and was therefore
17 not covered by § 1512. His argument, however, implicitly
18 conceded that, if the jury rejected his contention that his
19 efforts related to the disciplinary proceeding, the efforts
20 "relat[ed] in time, causation or logic," Quattrone, 441 F.3d at
21 177 n.24, to Galkovich's federal criminal proceeding.
22 Accordingly, the court's failure to explain in full an element
23 that Kaplan had essentially conceded was harmless.

1 In sum, any error in the jury instructions was harmless and
2 does not meet the standard of plain error. We reject Kaplan's
3 argument that we must vacate his conviction on Count Six.

4 **B. Conscious avoidance jury instruction**

5 Kaplan contends that it was error for the district court to
6 give a conscious avoidance charge on Count Six. We agree but
7 conclude that the error was harmless.

8 An instruction on conscious avoidance is proper only "(i)
9 when a defendant asserts the lack of some specific aspect of
10 knowledge required for conviction and (ii) the appropriate
11 factual predicate for the charge exists." *Quattrone*, 441 F.3d at
12 181 (internal citations omitted). As for the second of these
13 requirements, a factual predicate exists when "the evidence is
14 such that a rational juror may reach the conclusion beyond a
15 reasonable doubt that the defendant was aware of a high
16 probability of the fact in dispute and consciously avoided
17 confirming that fact." *Id.* (internal quotation marks omitted).

18 Evidence sufficient to find actual knowledge does not
19 necessarily constitute evidence sufficient to find conscious
20 avoidance. See *United States v. Ferrarini*, 219 F.3d 145, 157 (2d
21 Cir. 2000) ("The evidence shows that [defendant] actually knew of
22 the frauds; it is not sufficient to permit a finding that he
23 consciously avoided confirming them. The fact that a jury can --
24 on the evidence -- find actual knowledge does not mean that it

1 can also find conscious avoidance."). Because the only record
2 evidence indicates that Kaplan had actual knowledge of the
3 witness tampering, there was no factual predicate for a conscious
4 avoidance charge on Count Six, and it was error for the district
5 court to give it.⁶

6 Nevertheless, we find that the error was harmless because
7 there was overwhelming evidence of Kaplan's actual knowledge and
8 direct involvement in the witness tampering, see ante at 8. See
9 Quattrone, 441 F.3d at 181 (quoting Ferrarini, 219 F.3d at 154)
10 ("But an erroneously given conscious avoidance instruction
11 constitutes harmless error if the jury was charged on actual
12 knowledge and there was 'overwhelming evidence' to support a
13 finding that the defendant instead possessed actual knowledge of
14 the fact at issue.").

⁶ We reject Kaplan's argument that it was error for the district court to give a conscious avoidance charge when the government argued actual knowledge in the alternative. Although we noted in Ferrarini that evidence sufficient to find actual knowledge does not necessarily establish a factual predicate for conscious avoidance, 219 F.3d at 157, we have held that a conscious avoidance charge is "not inappropriate merely because the Government has primarily attempted to prove that the defendant had actual knowledge, while urging in the alternative that if the defendant lacked such knowledge it was only because he had studiously sought to avoid knowing what was plain," *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995). So long as the Government can establish a factual predicate for conscious avoidance, it is free to argue alternative theories of conscious avoidance and actual knowledge.

1 **C. Variance between bill of particulars and proof**

2 Finally, Kaplan argues that the Government's proof at trial
3 constructively amended, or prejudicially varied from, Count Seven
4 of the indictment, as clarified in a bill of particulars. We
5 disagree.

6 Count Seven, which arises from the statements that Kaplan
7 made to the FBI after his arrest, alleges that Kaplan "made
8 materially false, fictitious, and fraudulent statements and
9 representations, to wit, KAPLAN falsely informed an agent of the
10 Federal Bureau of Investigation about the circumstances
11 surrounding his purchase of a law practice from [Galkovich]." JA
12 17-18. These false statements were disclosed to Kaplan in an FBI
13 report prior to trial. In response to Kaplan's request for a
14 bill of particulars, the Government stated that "the statements
15 contained in paragraphs three and four on page one of Kaplan's
16 post-arrest statement form the basis of Count Seven."

17 At trial, the Government offered ample proof of numerous
18 false statements.⁷ In summation, the Government principally
19 contended that seven statements were false: Kaplan told the FBI
20 that (1) he was introduced to Galkovich and Medvedvosky by a
21 Vladimir Scheckman; (2) "he received a thousand cases from
22 Galkovich as a result of the sale;" (3) the Law Office was sold

⁷ On appeal, Kaplan does not challenge the sufficiency of this evidence to support his conviction on Count Seven.

1 to him for \$120,000; (4) he did not recall who gave him the
2 \$20,000 check used to purchase the Law Office; (5) he was assured
3 by Medvedovsky and Galkovich that the charges against Galkovich
4 "were nothing [because] Galkovich had done nothing wrong"; (6) he
5 "just stopped by" the January 8 meeting between Galkovich,
6 Medvedovsky, and Sherman without planning in advance to
7 participate; and (7) he did not take the conversation on January
8 8 "very seriously" and that they were just "joking around." Only
9 one of these statements -- concerning how Kaplan had met
10 Galkovich and Medvedovsky -- was specified in the bill of
11 particulars.

12 This does not constitute a constructive amendment of the
13 indictment. "To prevail on a constructive amendment claim, a
14 defendant must demonstrate that either the proof at trial or the
15 trial court's jury instructions so altered an essential element
16 of the charge that, upon review, it is uncertain whether the
17 defendant was convicted of conduct that was the subject of the
18 grand jury's indictment." *United States v. Salmonese*, 352 F.3d
19 608, 620 (2d Cir. 2003). Here, because the Government proved the
20 essential elements of the crime charged in Count Seven -- albeit
21 with different proof, as indicated above -- the indictment was
22 not constructively amended. See, e.g., *United States v. Wallace*,
23 59 F.3d 333, 337 (2d Cir. 1995) (holding that no constructive

1 amendment occurs "where a generally framed indictment encompasses
2 the specific legal theory or evidence used at trial").

3 A variance, on the other hand, occurs when the charging
4 terms remain unaltered but the facts proven at trial differ from
5 those alleged in the indictment or bill of particulars. See
6 United States v. Dupre, 462 F.3d 131, 140 (2d Cir. 2006); United
7 States v. Glaze, 313 F.2d 757, 759 (2d Cir. 1963) (holding that
8 once the Government has responded with a bill of particulars, it
9 is "strictly limited to proving what it has set forth in it.").
10 However, we will reverse on account of a variance only if it
11 prejudices the defendant by infringing on the "substantial
12 rights" that indictments exist to protect -- "to inform an
13 accused of the charges against him so that he may prepare his
14 defense and to avoid double jeopardy." Dupre, 462 F.3d at 140;
15 see also Glaze, 313 F.2d at 759 ("it is well settled that a
16 variance between the proof and the bill of particulars is not
17 grounds for reversal unless the [defendant] is prejudiced by the
18 variance.").

19 Assuming arguendo there was a variance, we detect no
20 prejudice to Kaplan's ability to prepare his defense or interpose
21 a defense of double jeopardy. Where the defendant has notice of
22 the "core of criminality" to be proven at trial, we have
23 permitted "significant flexibility" in proof without finding
24 prejudice. See United States v. LaSpina, 299 F.3d 165, 181-82

1 (2d Cir. 2002); see also *Salmonese*, 21 F.3d at 1236 (“A defendant
2 cannot demonstrate that he has been prejudiced by a variance
3 where the pleading and the proof substantially correspond . . .
4 .”). For example, in *Dupre*, we concluded that the proof of a
5 wire transfer other than that specified in the indictment was a
6 variance but did not prejudice the defendant because she was not
7 surprised by the proof, 462 F.3d at 141-42, and suffered no risk
8 of double jeopardy, *id.* at 143 n.12. Additionally, we have
9 routinely found that no prejudice results from a variance between
10 overt acts charged in an indictment and those proved at trial.
11 See, e.g., *Frank*, 156 F.3d at 337; *LaSpina*, 299 F.3d at 182-83;
12 *Salmonese*, 352 F.3d at 622 (“In this case, because [the]
13 [i]ndictment . . . gave [defendant] fair and adequate notice that
14 the conspiratorial scheme achieved its ultimate economic purpose
15 through the conspirators’ multiple sales of stripped securities
16 and their receipt of proceeds through June 1996, [defendant]
17 cannot show that he was prejudiced by proof of a few uncharged
18 proceed receipts after May 8, 1996.”).

19 The alleged variance here in issue similarly does not
20 justify reversal. Before trial, the government gave Kaplan the
21 FBI report detailing all of his statements. Count Seven of the
22 indictment was broadly framed, giving Kaplan notice of the “core
23 of criminality” to be proven at trial. And Kaplan’s counsel did
24 not object to the admission of the false statements not specified

1 in the bill of particulars, nor did he request a continuance when
2 they were introduced. There is therefore no indication in the
3 record that the evidence adduced at trial unfairly surprised
4 Kaplan, exposed him to a risk of double jeopardy, or unfairly
5 prejudiced him in any other way. The variance did not create
6 error, much less the plain error that arguably was required to be
7 shown as a result of Kaplan's failure to object.

8 We therefore reject Kaplan's argument that the Government's
9 proof at trial constructively amended, or prejudicially varied
10 from, Count Seven of the indictment.

12 CONCLUSION

13 We have considered all of Kaplan's remaining arguments on
14 appeal and find them to be without merit. For the reasons set
15 forth above, the judgment of conviction is vacated as to Counts
16 One, Two, Three, Four, and Five, and affirmed as to Counts Six
17 and Seven. The case is remanded for further proceedings
18 consistent with this opinion.